87 1623

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LOUIS SZTAN,

Petitioner,

vs.

DEPARTMENT OF THE NAVY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals to affirm the removal of a federal employee for unacceptable performance, is contrary to the legislative intent underlying an employee's right to be represented by an attorney, pursuant to the Civil Service Reform Act of 1978, where such employee's representation at the removal proceeding was rendered ineffective by the failure of the proposing agency to disclose to that employee the existence of ex parte communications between the proposing and deciding officials?

2. Whether the Court of Appeals erred in affirming the removal of Louis Sztan, in spite of ex parte communications containing new allegations of unacceptable performance not included in the proposed notice of removal, thus violating his due process rights under this Courts' holding in *Hannah v. Larche*?

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VS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Louis Sztan, Plaintiff and Petitioner, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit, filed December 18, 1987, in this proceeding.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, which is unpublished, appears in Appendix A hereto.

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was filed on December 18, 1987. This petition for a writ of certiorari is filed within ninety days of that date. This Court's juris-

diction is invoked under Title 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5 U.S.C.A. Sections 4303(a)-(b) (West Supp. 1987):

"Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which-

(i) in the case of a reduction in grade or removal under this section, specifies the in-

stances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action."

STATEMENT OF THE CASE

On March 20, 1986, Petitioner, Louis Sztan, was issued a Notice of Unacceptable Performance, by R.A. Findley, regarding several of the critical elements of his position as senior value engineer of NAVAIR. (Director of the Naval Air Systems Command, Value Engineering Program). The Notice advised Petitioner that he would have sixty (60) days to demonstrate acceptable performance.

On June 13, 1986, Findley issued Petitioner a Notice of Proposed Removal based on his alleged unsatisfactory performance during the 60-day performance improvement period. Following Petitioner's written and oral replies to the proposed notice, Admiral Calvert issued a decision on August 5, 1986 to remove the Petitioner based upon the reasons specified in the proposed notice.

Petitioner filed a Request for Review of the Agency decision on August 28, 1986. A hearing was held before Administrative Law Judge Paul Streb on November 14, 1986. On December 29, 1986 the Administrative Law Judge rendered his decision in favor of the Agency and against Petitioner, Louis Sztan. On February 2, 1987 Petitioner, Louis Sztan, filed a

Petition for Review with the Merit Systems Protection Board which was denied on May 5, 1987. Petitioner, filed his Petition for Review with the United States Court of Appeals for the Federal Circuit on June 3, 1987. Oral Argument was heard on December 2, 1987. On December 18, 1987, the Court announced its decision in which it affirmed the Department of the Navy's decision to remove Louis Sztan for unacceptable performance. Appendix p. A-1.

STATEMENT OF FACTS

Petitioner, Louis Sztan, was an employee of the federal government for twenty-five (25) years prior to termination and was last assigned to the Department of the Navy, Naval Air Systems Command (AIR-516). Mr. Richard A. Findley became the supervisor of AIR-516 and Louis Sztan's immediate supervisor on or about October 15, 1985. At this time, Dr. Somoroff and Mr. Bettino, Findley's immediate supervisors, informed Mr. Findley that he "ought to remove [Dr. Sztan] him." Thereafter, on March 20, 1986, Richard Findley sent Louis Sztan a Notice of Unacceptable Performance which he had ostensibly written. On June 13, 1986, Louis Sztan was sent a Notice of Proposed Removal for Unacceptable Performance which was prepared by Richard Findley. A written reply was submitted by Louis Sztan through his chosen counsel, Richard Murray, on July 7, 1986. An oral hearing on the proposed removal was held before RADM. J.F. Calvert on July 14, 1986.

Sometime between July 15, 1986 and July 28, 1986, and prior to the Admiral's decision, Richard A. Findley, the charging official, discussed the proposed re-

moval of Louis Sztan with RADM Calvert, and deciding official, orally and without notifying counsel for Louis Sztan. Thereafter, Richard Findley prepared and sent a derogatory memorandum via Dr. Somoroff, his immediate supervisor, to RADM Calvert concerning Louis Sztan's continuing performance, a copy of which was not sent to Louis Sztan nor his legal representative but was provided specifically to Sylvia Anderson, counsel for the Agency. Appendix A-4. The memorandum was received and reviewed by RADM Calvert on Thursday, July 31, 1986. Three working days later, on Tuesday, August 5, 1986, RADM Calvert rendered his decision ordering the removal of Louis Sztan from his position, thereby terminating his employment effectively on August 15, 1986.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BY THE COURT OF APPEALS TO AFFIRM LOUIS SZTAN'S REMOVAL IS CONTRARY TO THE LEGISLATIVE INTENT UNDERLYING AN EMPLOYEE'S RIGHT TO BE REPRESENTED BY AN ATTORNEY, PURSUANT TO THE CIVIL SERVICE REFORM ACT OF 1978, SINCE SUCH REPRESENTATION WAS RENDERED INEFFECTIVE BY THE DEPARTMENT OF THE NAVY'S FAILURE TO PROVIDE COPIES OF AN EX PARTE COMMUNICATION TO PETITIONER'S COUNSEL.

The deciding official ordered the removal of Louis Sztan from his position as Senior Value Engineer with the Department of the Navy based on Sztan's alleged unacceptable performance. The Administrative Law Judge affirmed this decision. The Merit Systems Protection Board denied Sztan's Petition for Review and the United States Court of Appeals for the Federal Circuit affirmed the decision below. Those decisions

are in direct conflict with the legislative intent underlying the Civil Service Reform Act of 1978 (Title 5 U.S.C.A. Section 4303(b)(1)(B) (West Supp. 1987)), which guarantees an employee the right to be *represented* by an attorney at a removal proceeding. (emphasis added)

The Civil Service Reform Act of 1978 provides for the removal of a federal employee based on unacceptable performance. 5 U.S.C.A. Section 4303 (West Supp. 1987). Such removal however, is statutorily subject to specific procedural safeguards. See 5 U.S.C.A. Sections 4303(a)-(b) (West Supp. 1987).

The ex parte communication between R.A. Findley, the proposing official, and Admiral Calvert, the deciding official, and the subsequent failure to disclose the substance or even the existence of that communication to petitioner's counsel, rendered Louis Sztan's legal representation ineffective and thereby violated Sztan's right to be *represented* by an attorney pursuant to 5 U.S.C.A. 4303(b)(1)(B) (West Supp. 1987). (emphasis added)

The legislative history of the Civil Service Reform Act of 1978 reveals that the Act's predecessor, the Performance Rating Act of 1950, contained no right to be represented by an attorney during a removal proceeding. Ch. 1123, Section 7, 64 Stat 1098, 1099 (1950). However, with the passage of the Civil Service Reform Act of 1978, Congress implemented new procedures to govern the removal of federal employees. These procedures were designed, "to expedite dismissals of federal employees whose performance (was) below an acceptable level established by a comprehensive framework of performance evaluation, while at the same time *fully protecting the due process rights*

of employees." 1978 U.S. Code Cong. & Ad. News 2723, 2746. (emphasis added) Moreover, the legislative history also sets forth a review of the merit system principles embodied in The Civil Service Reform Act. The history demonstrates that these principles, along with The Act as a whole, are intended not merely to protect some broad notion of an employee's due process rights, but specifically, "An . . . employee is also to be protected against *any* infringement of due process." Id. at 2741. (emphasis added)

By including the term "represented" in 5 U.S.C.A. 4303(b)(1)(B), Congress intended such representation to encompass more than merely the giving of legal advice. Such intent is made clear by examining the language employed by the Senate version of this section which stated that an employee was entitled to, "be *accompanied* by an attorney . . . " 1978 U.S. Code Cong. & Ad. News 2723, 2764-2765. (emphasis added) The term *accompanied* was not adopted. In fact, the final language of The Civil Service Reform Act states that an employee is entitled, "to be *represented* by an attorney." 5.U.S.C. 4303(b)(1)(B) (West Supp. 1987). (emphasis added) Congress therefore strengthened this procedural protection in order to utilize the concept of legal representation in the fullest sense of the term.

> The purpose of this procedure . . . is to permit the employee to reply to the proposed action and the reasons for the action, . . . and [u]nless the particular failure to perform acceptably is cited in the advance notice, the agency may not rely upon it as a grounds for demoting or removing the employee.

1978 U.S. Code Cong. & Ad News 2723, 2765.

The decision of the Court of Appeals to permit *any* ex parte communications that contain new allegations of unacceptable performance, between the proposing and deciding officials, without the knowledge of an employee's counsel, thus renders that employee's legal representation ineffective, and is therefore contrary to the legislative intent underlying the right to be *represented.*

The instant case presents the precise concern which prompted Congress to strengthen the procedural protections afforded an employee subject to a removal proceeding. The decision of the Court of Appeals to affirm Louis Sztan's removal, in spite of a serious infringement of due process which rendered his legal representation ineffective, is in direct conflict with the underlying legislative intent. Petitioner therefore respectfully urges that the decision affirming his removal be reversed.

B. THE COURT OF APPEALS DECISION CONDONING THE WITHHOLDING OF EX PARTE COMMUNICATIONS IN A REMOVAL PROCEEDING FROM AN EMPLOYEE'S COUNSEL CONSTITUTES A DENIAL OF DUE PROCESS UNDER THIS COURT'S HOLDING IN HANNAH V. LARCHE.

The Court of Appeals affirmed the Board's conclusion that since ex parte communications are not expressly prohibited by statute or regulation, Louis Sztan's argument that ineffective representation as a result of such communication constituted a denial a due process, was without merit.

The holdings of this Court expressly provide for full due process protection to be accorded an individual subject to a removal proceeding and guaranteed a right to be *represented* during that proceeding. In

Cafeteria & Restaurant Workers Union, etc., v. McElroy, 367 U.S. 886 (1961), this Court stated that:

> [c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Id. 367 U.S. at 895.

In addition, this Court has also noted that:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipients's interest in avoiding that loss outweighs the governmental interest in summary adjudication.
>
> *Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

In *Hannah v. Larche*, 363 U.S. 420 (1960), this Court enunciated the general principle that:

> . . . it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right, the nature of the proceeding and the possible burden on that pro-

ceeding, are all considerations which must be taken into account.

Id. 363 U.S. at 442.

The U.S. Court of Appeals for the Federal Circuit has only had occasion to review Title 5 U.S.C.A. 4303(b)(1)(B) (West Supp. 1987) one time, in a context quite different from the present one. In *Tiffany v. Department of Navy*, 795 F.2d 67 (Fed. Cir. 1986), the Court was confronted with the issue of whether adequate notice of an individual's right to be represented in connection with a demotion had been given. That Court has not otherwise reviewed this specific subsection of Title 5 U.S.C.A. Section 4303 nor has it considered the term *represented* within that subsection.

This Court has also not reviewed the meaning of *represented* within the context of Title 5 U.S.C.A. Section 4303(b)(1)(B) (West Supp. 1987). However, the term *represented* has been interpreted by the United States Court of Appeals for the Ninth Circuit within the context of the Administrative Procedure Act (Title 5 U.S.C. Section 1005(a) (current version at 5 U.S.C. 555(b) (1982)). In *FCC v. Schreiber*, 329 F.2d 517 (9th Cir. 1964), modified, 381 U.S. 279 (1964), the Court held that, "the word 'represented' must be read in light of the Due Process clause of the Fifth Amendment and therefore varies in meaning depending upon the nature of the function being exercised." Id. at 526.

In light of this Court's opinion in *Hannah* and the Court of Appeals' holding in *Schreiber*, in order to determine whether the failure to provide petitioner with the ex parte communication rendered his legal representation ineffective and was thus a denial of

due process, the Court of Appeals below should have analyzed the underlying protection of Title 5 U.S.C.A. Section 4303(b)(1)(B) (West Supp. 1987) in conjunction with those factors outlined by this Court in *Hannah*.

Such an analysis would have concluded that the *nature of the alleged right* to be represented, effectively, by an attorney, is statutory. Congress created this right and as discussed in part A of this petition, deemed it of paramount importance in protecting an employee's due process rights.

Furthermore, the *nature of the proceeding* is adjudicatory. In *Hannah*, this Court held that due process under the Fifth Amendment of the United States Constitution required that agencies adjudicating or making binding determinations that,"directly affect the legal rights of individuals . . . use procedures which have traditionally been associated with the judicial process." *Hannah*, 363 U.S. at 442. The Court's opinion expressly found that the function of the proceeding carried a great amount of weight in determining whether a particular right obtained in a specific proceeding. In analyzing the nature of the proceeding in *Hannah*, the Court noted that:

> [The Commission's] function is purely investigatory and fact-finding. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make any determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find fact which may

> subsequently be used as the basis for legislative or executive action.
>
> Id. 363 U.S. at 441.

The Court's opinion emphasizes the important distinction between adjudicative and investigative fact-finding proceedings and concludes that since the nature of the proceeding constituted the latter, due process protections did not attach. In the present case however, the fact that the nature of the proceedings are adjudicatory and that the Agency may take, "affirmative action which will affect an individual's legal rights," clearly demonstrates the significant due process rights viewed by this Court to have attached.

The Court of Appeals below has affirmed an agency decision which completely overlooks actions (the making and withholding of ex parte communications) that bear directly on an individual's statutory right to be represented by an attorney by rendering that representation ineffective. Under this Court's holding in *Hannah*, such a direct violation of an individual's due process rights cannot be permitted to stand. Therefore, since this removal proceeding was being held, not for fact-finding investigative purposes, but rather in order to make a final adjudication on the merits of Louis Sztan's removal, the procedure that rendered petitioner's right to representation ineffective is in direct contravention of the holding in *Hannah*.

Finally, any *possible burden on the proceeding* that providing the ex parte communication to Petitioner could have imposed, would have been minimal. In fact, the proposing official deemed the memorandum he sent to admiral Calvert important enough to provide a timely and separate copy of it to counsel for the

agency in the belief that a copy would be transmitted to Petitioner. However, neither Louis Sztan nor his counsel was given a copy of the memorandum or informed of its existence until it was discovered by chance during a deposition of R.A. Findley held after the Agency decision was rendered. Furthermore, this document was within the discovery requests of Louis Sztan, which were continuing in nature.

The communication between R.A. Findley and Admiral Calvert was such that it bore directly on Calvert's decision whether or not to order Petitioner's removal. That is why the memorandum was sent. As a result of withholding the fact of its existence however, Louis Sztan's due process rights were trammeled upon. Sztan's counsel was unaware of the new allegations that were being raised by the ex parte communication and was therefore unable to rebut them. In addition, failure to provide a copy of the ex parte communication to petitioner's representative denied counsel an opportunity to address a serious procedural irregularity. Thus, had petitioner's counsel been aware of the ex parte communication, there were a number of things he could have done in order to protect Louis Sztan's right to be *represented.*

The decision of the Court of Appeals to dismiss this incursion on the due process rights of a federal employee departs from the established parameters governing adjudicatory proceedings. This Court should correct such a complete failure to abide by its holding in *Hannah* and reverse the decision below.

CONCLUSION

The decision of the United States Court of Appeals for the Federal Circuit, affirming the removal of Louis Sztan, in spite of ex parte communications that rendered his legal representation ineffective, is contrary to the legislative intent underlying an employee's right to be represented by an attorney in a removal proceeding, guaranteed by the Civil Service Reform Act of 1978, and constitutes a denial of due process under this Court's holding in *Hannah* and therefore must be reversed.

FOR THESE REASONS, petitioner prays that a writ of certiorari issue to review and reverse the decision of the United States Court of Appeals for the Federal Circuit.

RICHARD MURRAY
LAW OFFICES OF RICHARD MURRAY
Attorney for Petitioner

NOTE: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-34439

LOUIS SZTAN,

Petitioner,

v.

DEPARTMENT OF NAVY,

Respondent.

DECIDED: December 18, 1987

Before Bissell, *Circuit Judge*, Cowen, *Senior Circuit Judge*, and Mayer, *Circuit Judge*.
PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (Board), No. DC04328610498 (MSPB Dec. 29, 1986), affirming the Department of the Navy's decision to remove Louis Sztan for unacceptable performance, is *affirmed*.

OPINION

Petitioner argues that his attorney and constitutional rights were violated as a result of an ex parte memorandum sent by R.A. Findley, the charging official, to RADM J.F. Calvert, the deciding official. The one-page memorandum stated that petitioner's work performance continued to be deficient, and cited several examples in support thereof. According to petitioner, the Board erred in concluding that the memo did not invalidate the removal proceedings, relying on *Sullivan v. Department of Navy*, 720 F.2d 1266 (Fed. Cir. 1983).

A careful review of the entire record demonstrates that petitioner's argument is without merit. Firstly, as the Board recognized, "[t]here is no statutory or regulatory prohibition on ex parte communications between proposing and deciding officials." *Sztan v. Department of Navy*, No. DC04328610498, at p. 15 (MSPB Dec. 29, 1986) (citing *Farris v. Department of the Air Force*, 26 M.S.B.P. 299, 303 (1985), *aff'd*, 785 F.2d 232 (Fed.Cir. 1985) (unpublished opinion)). Whether such communications are improper, depends upon the circumstances of each case.

Secondly, petitioner's reliance on this court's decision in *Sullivan* is misplaced. In *Sullivan*, the court reversed a removal action after concluding that multiple ex parte communications from an adversary to the deciding official vitiated the entire removal proceedings. As found by the court, "a true *adversary* with motives of reprisal sought to pressure the deciding official into making a decision to remove the petitioner from his employment." *Sullivan*, 720 F.2d at 1272 (emphasis added).

In the present case, substantial evidence supports the Board's finding that there was not an adversarial relationship between Findley and petitioner. There was no evidence that Findley, in proposing petitioner's removal, "was out to get" petitioner, or that the agency attempted to conceal the memorandum.

Moreover, there is substantial evidence to support the Board's conclusion that Admiral Calvert was not influenced in making his decision by the information in the memorandum. The admiral testified that he did not consider the memorandum, because it covered matters which were not in the proposal notice,and he knew it would have been improper for him to consider such matters. The Board gave Admiral Calvert's testimony "heavy weight", stating that he was a "very credible witness."

Accordingly, there is substantial evidence to support the Board's decision that the new information did not influence the admiral's final decision, and that petitioner was properly removed for unacceptable performance.

NAVAL AIR SYSTEMS COMMAND
NAVAL AIR SYSTEMS COMMAND HEADQUARTERS
WASHINGTON, DC 203619

IN REPLY REFER TO
29 July 1986

From : AIR-516
To : AIR-05
Via : AIR-51

Subj : VE SUPPORT BY DR. SZTAN

1. My issue with Dr. Sztan is *not* improving. On Thursday, 24 July, I received a VECP disapproval letter with Dr. Sztan's comment (in writing) that the letter was unsatisfactory and required rewriting. I reviewed the proposed letter and agreed. I met with Lou, told him of my agreement and asked him to rewrite it, to improve it. Friday morning I received a rewrite which was no better and I returned it to Dr. Sztan with verbal comments. Only after I had done that did I receive a call from Bob Martin, a support contractor for the F/A-18 Class Desk, asking what had to be rewritten. *He* had been tasked by Dr. Sztan to rewrite the letter, *both* the first and second time, and was confused. I apologized for the confusion and told him I was unaware that he had been tasked by Dr. Sztan to rewrite the letter. I offered to meet with him Monday morning to get the letter moving.

2. When I met with him, he showed me some documentation about the VECP which sowed serious doubt in my mind that we should recommend disapproval. More infuriating was his statement that all this material had been provided to Dr. Sztan. I further found out that Dr. Sztan had received a draft memorandum from AIR-546 last Thursday which seeks to provide clarification on another VECP for which we have recommended disapproval. Dr. Sztan had not mentioned this to me even though he knows of my high interest in this particular VECP.

3. Dr. Sztan continues to present information which supports his predetermined solution to an issue and does not give me full facts. It is no wonder that industry, per Jim Quinn's letter to VADM Wilkinson recently, thinks NAVAIR's responsiveness to VECP's is "in the dark ages compared to one of the Army's Commands." AIR-516 continues to provide arbitrary and at times conflicting directions to decisions on VECP's!

R.A. FINDLEY

87 1623

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LOUIS SZTAN,

Petitioner,

VS.

DEPARTMENT OF THE NAVY,

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SUPPLEMENTAL APPENDIX

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

LOUIS SZTAN, *Appellant,*	)	DOCKET NUMBER DC04328610498
v.	)	
DEPARTMENT OF THE NAVY, *Agency.*	)	DATE: December 29, 1986

RICHARD MURRAY, ESQUIRE MURRAY & PIETROVITO, Fairfax, Virginia, for the appellant.

SYLVIA EUGENE ANDERSON, Esquire for the agency.

BEFORE

Paul G. Streb
Administrative Judge

DECISION

INTRODUCTION

On August 28, 1986, Dr. Louis Sztan filed an appeal from the decision of the Department of the Navy, Naval Air Systems Command (NAVAIR), to remove him from the federal service effective August 15, 1986. The removal action was taken pursuant to 5 U.S.C. Section 4303(a) for unacceptable performance. The appeal is within the juris-

diction of the Merit Systems Protection Board. See 5 U.S.C. Section 4303(e).

The agency's decision is AFFIRMED.

ANALYSIS AND FINDINGS

Background

Appellant was employed as a General Engineer, GM-14, in the Engineering Support and Product Integrity Management Division, Assistant Commander for Systems and Engineering, NAVAIR. As Senior Value Engineer, he was responsible for managing and coordinating NAVAIR's value engineering program to assure that naval aircraft and related systems and equipment were developed and produced at the lowest overall cost. Agency File (AF), tab 2.

On January 6, 1986, appellant's supervisor, Richard A. Findley, issued an interim appraisal of appellant's performance. Agency Hearing Exhibit 1. Appellant was rated unsatisfactory on his performance of the duties related to the first critical element of his position; he was rated "marginal to unsatisfactory" on his performance of the duties related to his second and third critical elements. On March 20, 1986, Findley issued appellant a notice of unacceptable performance regarding his first three critical elements. AF, tab 5. The notice advised appellant that he would have 60 days to demonstrate acceptable performance.

On June 13, 1986, Findley issued appellant a notice proposing to remove him from federal services based on his unsatisfactory performance during the 60-day performance improvement period. AF, tab 8. Following appellant's written and oral replies to the proposal notice, AF, tabs 9, 10, Admiral John F. Calvert, Assistant Commander for Systems and Engineering, issued a decision on August 5, 1986, to remove appellant based on the reasons specified in the proposal notice, AF, tab 11.

Bases For Removal Action

Paragraph 3(a) of the proposal notice alleged that appellant unsatisfactorily performed duties relating to his third critical element, which required him to advise NAVAIR and contractors regarding value engineering policy and practices. The minimum performance standard for that critical element required appellant to:

> Provide timely and satisfactory support. Execute all communications in a manner conducive to gaining support for value engineering objectives, building positive working relations, and whenever possible, developing a consensus course of action.

AF, tab 6. Paragraph 3(a) alleged specifically that appellant failed in several attempts to draft an acceptable memorandum for record concerning a meeting between agency officials and a contractor (Grumman) on the status of the contractor's value engineering program.

Findley testified and stated in his detailed proposal notice that appellant's first draft of the memorandum was unacceptable, he gave appellant instructions for revising it, appellant failed to comply with those instructions in revising the memorandum, and, after several unsuccessful attempts by appellant to revise the memorandum, he (Findley) rewrote it. Findley's version is supported by appellant's various drafts of the memorandum and Findley's comments thereon and written instructions to appellant.

Appellant testified that he did not draft a detailed memorandum because the purpose of the memorandum was merely to refresh the memory of the attendees, and that he did not include an attendee list because he had already sent such a list to all attendees. He testified that Findley's instructions were not sufficiently detailed, and that an adversary relationship had developed between him and Findley.

Based on my review of the documents in question, AF, tab 7, I find that Findley's instructions were very specific and detailed, and they should have put appellant on notice of what was expected in the memorandum. In his instructions, Findley explained his objections to appellant's draft memorandum and even gave some examples. His notes reflect that he wanted the attendee list attached to the memorandum so the agency's records would be clear. Findley's instructions also reflect that he wanted the memorandum to be detailed and accurate. It is clear from a review of the documents in question that appellant failed in several attempts to comply with Findley's instructions. As to the adversary relationship that appellant feels had developed between him and Findley, I note that disputes between supervisors and subordinates over alleged performance deficiencies "can scarcely avoid involving clashes of personalities." Arnett v. Kennedy, 416 U.S. 134, 155 n.21 (1974). I find the allegations in paragraph 3(a) to be supported by substantial evidence. See 5 C.F.R. Section 1201.56(c) (1).[1]

Paragraph 3(b) of the proposal notice alleged that appellant unsatisfactorily performed duties relating to his second critical element, which required him to analyze procurement requests and value engineering change proposals and to provide technical, economic, and contractual recommendations to appropriate NAVAIR components. The minimum performance standard for that critical element provided as follows:

> Evaluate value engineering change proposals and procurement documents in technically sound and timely manner consistent with NAVAIR policy (including tar-

[1] On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

> get times). Communications within and outside NAVAIR necessary to complete evaluation are made in a professional manner engendering support for the value engineering program.

AF, tab 6. Paragraph 3(b) alleged specifically that appellant incorrectly interpreted value engineering rules as applies to a value engineering change proposal submitted by Texas Instruments, and that he erroneously determined that a piece of contractor-furnished equipment was government-furnished equipment. It was alleged further that appellant impeded the timely approval of the change proposal. Findley testified in support of these allegations and recounted the events in detail in the proposal notice. See DePauw v. International Trade Commission, 782 F.2d 1564, 1567 & n.8 (Fed. Cir. 1986). His testimony was supported by his notes regarding his conversations with agency officials on this matter and memoranda from them. The testimony and documentary evidence show that the officials concurred in Findley's judgment that appellant had erred in this matter. According to the contracting officer, the equipment in question was furnished by the contractor, and failure to approve the change proposal would have resulted in a missed opportunity to save the government several hundred thousand dollars. Agency Hearing Exhibit 2.

In his testimony, appellant admitted that he made an error in this matter, but he denied that he intentionally impeded the timely approval of the change proposal. He testified that any delay on his part was caused by his need to study a matter related to the change proposal. However, regardless of appellant's intent, his action was not timely. Findley stated that despite being informed of the urgency of the matter in January 1986, appellant delayed action until April 1986. In view of appellant's admission of error, the testimony of Findley, and the supporting views of other agency officials, I find that there is substantial evidence to support these allegations.

Paragraph 3(c) of the proposal notice alleged that appellant unsatisfactorily performed duties relating to his first critical element, which required him to implement policy and procedures in response to Department of Defense, Chief of Naval Material, and NAVAIR directives and policy initiatives. The minimum performance standard for that critical element required appellant to provide timely, technically competent, and complete responses to requests for support. AF, tab 6.

Paragraph 3(c) alleged specifically that several items of correspondence which appellant submitted for Findley's signature contained numerous errors and required significant rewriting. Findley testified in support of this allegation, and the record contains copies of the correspondence in questions and Findley's critiques of that correspondence. Findley testified that he instructed appellant to prepare letters to certain nominees who had not been selected for awards. However, it is evident from appellant's draft letter that it did not advise them of their nonselection.

Findley faulted appellant for naming a contractor in another draft letter while competition for the contract was still in progress. Appellant testified that there had been an oral agrement to extend the contract with the contractor he had named until a new contract was awarded upon completion of formal competition. However, in view of the possibility of misinterpretation by someone without complete knowledge of the situation, I agree with Findley's position on this matter. Therefore, I find these allegations to be supported by substantial evidence.

Paragraph 4 of the proposal notice alleged that appellant's performance regarding his third critical element was unsatisfactory in that he failed to make many of the substantive changes which Findley had recommended for a value engineering guidelines document, and that the changes which appellant did make were flawed. These al-

legations were supported by Findley's testimony and detailed recommendations which he gave appellant in this matter. Findley testified that appellant never completed this task.

Although appellant argued that the document which he submitted to Findley was satisfactory, I find that appellant clearly had a duty to comply with his supervisor's instructions to make changes. Moreover, as the division director, Findley was in a better position to judge whether appellant had generated a document acceptable for issuance by the division. See Baker v Defense Logistics Agency, 782 F.2d 1579, 1582 (Fed. Cir. 1986); Martin v. Federal Aviation Administration, 795 F.2d 995, 997 (Fed. Cir. 1986). I find these allegations to be supported by substantial evidence.

Paragraph 5 of the proposal notice alleged that appellant's performance regarding his first critical element was unsatisfactory in that he failed to perform one of his assigned tasks—preparation of a written plan to improve the management of value engineering within NAVAIR. Appellant admitted that he did not perform this tasks, but he testified that he did not have enough time to complete it in view of his other assignments. He also testified that Findley never discussed this task with him or prioritized his various tasks, and that NAVAIR had no immediate need for such a plan.

I find no merit in these arguments. If appellant believed he could not complete the task because of other assignments, he should have so advised Findley in a timely manner. However, appellant did not do so until the time limit for completing the task had expired. In view of the relatively high level of appellant's position and the fact that he was supposed to perform his duties in an autonomous manner, AF, tab 2, Findley certainly had no duty to prioritize appellant's tasks or give him detailed guidance on the preparation of the plan. Moreover, there is no evidence that appellant asked for guidance. Appellant's view that

NAVAIR had no immediate need for a plan to improve the management of value engineering does not excuse his failure to comply with instructions from his supervisor, who was in a better position to determine NAVAIR's needs. I find that there is substantial evidence to support this allegation.

Paragraph 6 of the proposal notice alleged that appellant's performance regarding his first critical element was unsatisfactory in that he failed to submit an accurate report on the status of value engineering change proposals with NAVAIR. Findley testified that there were numerous errors in the report, and that, consequently, issuance of the report was delayed for 2 weeks. Appellant's testimony was somewhat unclear, but he seemed to blame the errors on the submission of erroneous data to him by other persons and on the fact there those persons were not always present at work when he called to obtain data from them.

I agree that appellant should not be held responsible for matters not within his control. However, it is unclear from appellant's vague testimony whether that was the case. Appellant has not given any specific examples of instances where he was provided erroneous data which he had reason to believe was correct, and he has not explained why he could not have obtained the data from other persons when the persons he called were absent. I find this allegation to be supported by substantial evidence.

Paragraph 7 of the proposal notice alleged that appellant's performance regarding his second critical element was unsatisfactory with respect to his performance of an assignment to prepare memoranda to program managers and division directors who had value engineering change proposals in the command for more than 90 days. The time limit for completing action on such proposals was 45 days. Findley testified and stated in his detailed proposal notice that appellant initially based the memoranda on an outdated status report; although appellant prepared new

memoranda , he neglected to issue them during Findley's absence; and the new memoranda contained numerous errors, for example, errors in coding and omission of some of the change proposals that were in process.

Appellant did not contest Findley's assertions that the initial memoranda were based on an outdated status report, and that the final memoranda contained errors. However, he testified that he recommended to Findley's deputy that the memoranda not be issued because the offices in question were actively working the change proposals, and nothing would be gained by sending the memoranda. He testified that Findley's deputy agreed with his recommendation and told him not to issue the memoranda.

Although appellant had been tasked by Findley to issue the memoranda, appellant's high-level position certainly gave him the latitude to make a recommendation to the person in charge of the office in Findley's absence if he believed that the circumstances at the time did not warrant issuance of the memoranda. There was no evidence that appellant misrepresented anything to Findley's deputy. As the deputy agreed with appellant and told him not to issue the memoranda, I do not find that this allegation is supported by substantial evidence. However, I find that Findley's uncontested testimony and supporting documentation constitute substantial evidence to support the other two allegations in paragraph 7 of the proposal notice.

Appellant's Defense

Appellant raised several defenses in his petition for appeal and his post-hearing brief. Although appellant contends that the penalty of removal is unduly harsh, the Board has no authority to mitigate penalties imposed pursuant to 5 U.S.C. Section 4303(a) in unacceptable performance cases. The Board can only affirm or reverse the agency's action. Lisiecki v. Merit Systems Protection Board, 769 F.2d 1558 (Fed. Cir. 1985).

Appellant contends that his performance standards were vague, subjective, and arbitrary, and that in some cases his performance was judged on the basis of new criteria. The latter contention apparently pertains to the fact that Findley gave appellant several assignments during the 60-day performance improvement period.

I do not find appellant's performance standards to be vague or arbitrary, especially in view of the fact that Findley gave appellant numerous specific instructions regarding his tasks. See Shuman v. Department of the Treasury, 23 M.S.P.R. 620, 626-27 (1984). Although the standards permit subjective judgments, I find nothing improper in that regard in view of the nature of appellant's position. See id.; Jackson v. Environmental Protection Agency, 770 F.2d 1048, 1056 (Fed. Cir. 1985). Moreover, I find nothing improper regarding Findley's assignments to appellant during the performance improvement period because they all pertained to his critical elements.

Appellant next contends that the performance improvement period was too short to enable him to demonstrate acceptable performance. However, I find that appellant had ample opportunity to improve. He had 60 days to demonstrate acceptable performance, and he was given several important tasks during that period.

Appellant next contends that Findley exceeded his authority in this matter and failed to "recognize appellant's duties as provided in his job description." Although this contention is somewhat unclear, I find that Findley, as appellant's supervisor and division director, certainly had authority to give him assignments, evaluate his work performance, and propose his removal. There was no evidence of any agency restriction on Findley's authority. Further, I find that Findley "recognized" appellant's duties set forth in his position description in the sense that appellant's critical elements and work assignments were related to those duties.

Appellant next contends that the agency committed numerous violations of statutes and of his constitutional rights in conjunction with several events surrounding the removal action. Findley testified that when he first took over as division director in October 1985, John J. Bettino, who was deputy to Admiral Calvert (the deciding official), advised him of problems with appellant's performance and stated that he "ought to remove" appellant. Thus, appellant contends, his removal was predetermined even before he began working for Findley.[2]

I find no merit in this contention. Findley testified that he responded to Bettino's recommendation by stating he would not take any action concerning appellant until he had an opportunity to evaluate his performance. Findley's subsequent actions are consistent with that testimony, and they did not show that he had prejudged appellant's performance. Findley gave appellant more than adequate warning there were problems with his performance. Prior to issuing the March 20, 1986 notice of unsatisfactory performance, which began appellant's formal performance improvement period, Findley gave appellant an interim appraisal on January 6, 1986, which advised him of performance deficiencies. The fact that I have sustained virtually all of Findley's allegations of unsatisfactory performance shows that Findley made sound judgments on appellant's performance and did not simply propose his removal at Bettino's urging.

Appellant also contends that his statutory and constitutional rights were violated by Findley's action of engaging in oral and written ex parte communications with the deciding official, and by the agency's action of failing

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[2] Although it is undisputed that Bettino advised Findley of appellant's performance problems, there is conflicting evidence as to whether Bettino urged Findley to remove appellant. However, for purposes of appellant's contention, it is Findley's perception of the conversation that is important. Thus, I will accept his version.

to disclose the written ex parte communication during discovery in the present proceeding. Findley testified that he once asked Admiral Calvert while his decision was pending if he had reached a decision on appellant's proposed removal. On July 29, 1986, before Admiral Calvert had rendered a decision, Findley sent him a one-page memorandum alleging that appellant's performance continued to be deficient, and stating that, "It is no wonder that industry, per Jim Quinn's letter to VADM Wilkinson recently, thinks NAVAIR's responsiveness to [value engineering change proposals] is 'in the dark ages compared to one of the Army's Commands.' " The Memorandum set forth several examples of the alleged continuing performance deficiencies. Appellant's Hearing Exhibit 1. Appellant did not become aware of the memorandum until he deposed Findley during the present proceeding before the Board.

There is no statutory or regulatory prohibition on ex parte communications between proposing and deciding officials. Farris v. Department of the Air Force, 26 M.S.P.R. 299, 303 (1985), aff'd, 785 F.2d 323 (Fed. Cir. 1985) (unpublished opinion). Whether such communications are improper depends on the circumstances of each case.

Although I find nothing improper in Findley's single question to Admiral Calvert as to whether he had made a decision, it is clear that Findley improperly conveyed in his memorandum to the deciding official new allegations and information which appellant had no opportunity to review and respond to. See Anderson, v. Department of State, 27 M.S.P.R. 244, 349 (1985). However, I do not find that the deciding official was influenced by the new allegations and information in making his decision. See id. Admiral Calvert testified that he did not consider the memorandum in reaching his decision because it covered matters which were not in the proposal notice, and he knew it would have been improper for him to consider such matters. In my judgment, Admiral Calvert was a very credible witness. He was sincere, straightforward, and con-

vincing, and there was no evidence in conflict with his testimony. Therefore, I find that his testimony deserves heavy weight.

Even assuming arguendo that Admiral Calvert considered the memorandum in reaching his decision, I would not find the error to be harmful. See id. In view of the numerous allegations of unsatisfactory performance in the proposal notice, it is unlikely that the limited new information in the memorandum would have had an impact on Admiral Calvert's decision.

Furthermore, the present case is clearly distinguishable from Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed. Cir. 1983), in which a removal action was reversed because the court found that a true adversary with motives of reprisal toward an employee whose removal had been proposed sought to pressure the deciding official into making a decision to remove the employee. The Board has stated, interpreting Sullivan, that:

> In Sullivan the court specifically found that the third party who intervened had a motive of reprisal against Sullivan for his having filed a grievance against him and that the third party was an adversary in that he initiated the investigation [consisting of constant surveillance of Sullivan], actively and consistently participated in the case, and put pressure on the decision maker. It was the combination of these actions the Court found improper.

Farris v. Department of the Air Force, 26 M.S.P.R. 299, 302-03 (1985), aff'd, 785 F.2d 323 (Fed. Cir. 1985) (unpublished opinion). The fact that Findley was the proposing official did not make him an adversary of appellant. Id. There was no evidence that appellant had filed a grievance against Findley, or that Findley was "out to get" appellant for some other reason. See Chappelle v. Department of Labor, 27 M.S.P.R. 352, 354 (1985), aff'd 790 F.2d 91 (Fed. Cir. 1986) (unpublished opinion). Although there were

several ex parte communications made to the deciding official that Sullivan be removed, there was only one memorandum concerning appellant's continuing unsatisfactory performance in the present case. I find that Sullivan is inapposite to the present case.

Although the agency should have furnished Findley's memorandum to appellant's counsel sooner than it did during discovery in the present proceeding before the Board, I find no evidence that the agency improperly attempted to conceal the memorandum. In any event, appellant was not harmed by the delay because he was able to make extensive arguments regarding the memorandum in this proceeding. I conclude that appellant was not denied due process of law or deprived of the effective assistance of counsel, and that the agency did not commit a prohibited personnel practice with respect to the matters pertaining to the memorandum.

Although appellant contends that the agency failed to follow all of the statutory and regulatory requirements in effecting his removal, I find, after review and study of the entire record, that the agency has met its burden of proof on all required elements of this case. See Lovshin v. Department of the Navy, 767 F.2d 826, 834 (Fed. Cir. 1985) (en banc), cert. denied, 106 S. Ct. 1523 (1986). The agency set up an approved performance appraisal system. AF, tab 3. The agency communicated appellant's critical elements and performance standards to him at the beginning of his appraisal period, AF, tab 6; as discussed supra, Findley amplified those standards by giving appellant various instructions. See DePauw v. International Trade Commission, 782 F.2d 1564, 1566 (Fed.Cir. 1986). As discussed supra, Findley warned appellant of deficiencies in his performance for the critical elements in question, and he provided him reasonable opportunity to improve his performance. The agency proved numerous instances of

when appellant's performance failed to meet his performance standards for three of his critical elements.

Appellant's removal is AFFIRMED.